IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 11190 of 2005

For Approval and Signature:

HON'BLE MR.JUSTICE A.M.KAPADIA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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JAFAR HUSSAIN GULAM HUSSAIN GULAMNABI - Petitioner(s)

Versus

HUSENABIBI GULAMNABI - Respondent(s)

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Appearance :

MR ASHOK K PADIA for Petitioner No(s).: 1.
MR NS SHETH for Respondent No(s).: 1.

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CORAM : HON'BLE MR.JUSTICE A.M.KAPADIA

Date : 20/07/2005

ORAL JUDGMENT

1. Challenge made in this petition filed under Article 227 of the Constitution of India is to the order dated 15.4.2005 rendered in PSRP Application No.13 of 2002 by the learned Judge, Small Causes Court (Court No.12) Ahmedabad by which the PSRP Application No.13 of 2002 filed by respondent against the petitioner is

allowed and thereby in exercise of powers conferred under Section 41 of the Presidency Small Cause Courts Act, 1882 ('the Act' for short), the relief claimed in terms of para 7 of the application is granted and possession warrant in respect of the premises described in the application was issued and the petitioner was directed to handover possession of the premises described in the application to the respondent within one month from the date of the order.

2. According to the case of the respondent, she is the owner of the premises of Ward Shahpur – 2 – C bearing Survey No.04362. She has purchased the said property on 2.1.1987 from Gulamnabi Jivabhai. It is alleged that brothers of the respondent filed Civil Suit No. 3948 of 1990 which was dismissed and thereafter the respondent asked the petitioner to vacate the suit premises. It is alleged that the respondent was not charging any consideration for the use and occupation of the said premises. The petitioner has no right, title or interest in the premises. The petitioner is the son of brother of the respondent and therefore the respondent was not charging any rent or licence fee from the petitioner and he was permissive user of the premises. It is alleged that the petitioner has misused relation and is not vacating the premises and therefore notice dated 8.8.2002 was issued to the petitioner. The petitioner did not comply with the notice and therefore the respondent filed the PSRP Application No. 13 of 2002 in the trial court.

3. The petitioner did not file any reply to the PSRP application and therefore ex-parte order was passed against the petitioner.

4. Thereafter the petitioner submitted an affidavit and application for filing written statement and to set aside ex-parte order passed against him. In view of the said

application, the trial court granted application for filing written statement. The petitioner thereafter filed written statement at Ex.28 inter alia contending that he is residing in the suit premises from his birth and from the life time of his grandfather. The respondent has to obtain possession by due course of law. It was also contended that in view of the judgment rendered in Civil Suit No.3948 of 1990 it cannot be said that the respondent has become owner of the suit premises. The respondent has other two premises in the city of Ahmedabad in Vanmali Vankani Pole. It was also alleged that the respondent only is not the owner of the suit premises but his aunt Sharifabibi is also owner of the premises. There is no partition of the property amongst the heirs of his grandfather and therefore the respondent is not entitled to possession of the suit premises. It was also contended that the petitioner is residing in the suit premises prior to 1987 i.e., prior to execution of the will by his grandfather. It was therefore urged that the PSRP application may be dismissed.

5. The learned trial Judge after recording oral evidence and submissions made by the learned advocates for the parties, passed order in favour of the respondent and against the petitioner by directing him to vacate the premises in question which has given rise to the present petition at the instance of the original opponent of PSRP Application No.13 of 2002.

6. Mr. Padia, learned advocate for the petitioner, has contended that the learned trial Judge has erred in holding that the petitioner's use of the premises was permissive. According to him, the petitioner is living in the premises as of his right, title and interest and as per succession as per the Muslim Law applicable to Sunni Muslim

and as per the will made by his grandfather Gulamnabi without prejudice to his contention that the said will is illegal as per the Muslim Law as applicable to Sunni Muslim. According to him, the impugned order directing to handover possession of the premises in question is unjust, perverse and capricious and therefore deserves to be quashed and set aside by allowing the petition.

7. It is also asserted by him that so far as the invocation of powers under Section 41 of the Act is concerned, the learned trial Judge has misdirected himself by holding that the application filed by the respondent is covered under section 41 of the Act. According to him, under section 41 of the Act, the licensee can file suit before the Civil Court but not before the Presidency Small Causes Court. Therefore, according to him, the learned trial Judge has wrongly assumed jurisdiction and thereby a jurisdictional error has been committed by the learned trial Judge which can be corrected in the petition which is filed under Article 227 of the Constitution of India.

8. In support of the aforesaid contention, he has relied upon the judgment of a Division Bench of the Bombay High Court in the case of Ramesh Dwarkadas Mehra v. Indravati Dwarkadas Mehra, AIR 2001 Bombay 470. He, therefore, prayed that this petition deserves to be allowed by quashing and setting aside the impugned order. It is, therefore, urged to allow this petition and dismiss the PSRP Application filed by the respondent. He therefore urged to allow his petition.

9. Mr. Sheth, learned advocate for the respondent/original applicant has contended that the petitioner did not file any suit before the Civil Court of competent jurisdiction for the declaration of his status in the suit premises and for other

consequential reliefs as was his duty to do. He contended that no illegality or infirmity much less jurisdictional error has been committed by the learned trial Judge in passing the impugned order.

10. So far as reliance placed on the reported judgment of the Bombay High Court in Ramesh Dwarkadas Mehta's case (supra) is concerned, it is contended that the ratio laid down by the Bombay High Court in the said decision is not applicable to the facts of the present case because Section 41 of the Act in State of Maharashtra is different and distinct from Section 41 applied to the State of Gujarat. It is also asserted by him that when the landlord/owner of an immovable property files an application under Section 41 of the Act, the occupier has to file a civil suit under Section 47 of the Act within the stipulated time and has to apply for stay of such proceedings and has also to ask for a declaration that the action of bringing an application under Section 41 of the Act was an act of trespass on the part of the landlord/owner.

11. In support of the aforesaid submission, Mr. Sheth has relied upon a decision of this Court in the case of Saiyed Jabbarhusain v. Hasan Abubakar Malbari, 1997 (3) GLR 2191. Therefore, according to him, there is no illegality or infirmity committed by the learned trial Judge in passing the impugned order and hence the said order does not warrant interference of this Court in this petition which is filed under Article 227 of the Constitution of India wherein the jurisdictional sweep is very limited and confined only to the correcting of the jurisdictional error committed by the court below. In this case, the learned advocate for the petitioner has not been able to point out any jurisdictional error committed by the learned trial

Judge. Therefore, according to him, this petition lacks merit and deserves to be rejected. He, therefore, urged to dismiss the petition.

12.This Court has given anxious considered thought to the rival submissions of the learned advocates of the respective parties, perused the impugned order, set of evidence, statutory provisions contained under the Act and the judgments cited at the bar.

13.So far as the factual matrix is concerned, the respondent filed PSRP Application No. 13 of 2002 contending that she is the owner of the premises of Ward Shahpur – 2 – C bearing Survey No.04362. She has purchased the said property on 2.1.1987 from Gulamnabi Jivabhai. It is alleged that brothers of the respondent filed Civil Suit No. 3948 of 1990 which was dismissed and thereafter the respondent has asked the petitioner to vacate the premises. It was alleged that the respondent was not charging any consideration for the use and occupation of the said premises. The petitioner has no right, title or interest in the premises. The petitioner is the son of brother of the respondent and therefore the respondent was not charging any rent or licence fee from the petitioner. So the petitioner was permissive user of the premises. It was alleged that the petitioner has misused relation and not vacating the premises and therefore notice dated 8.8.2002 was issued to the petitioner. The petitioner did not comply with the notice and therefore the respondent filed the PSRP Application No. 13 of 2002 in the trial court.

14.The contention that the provisions of Section 41 of the Act is not applicable to the facts of the present case has no substance. A bare look to Section 41 of the Act reveals that the intention of Legislature in providing the jurisdiction to Small

Causes Court under Section 41 of the Act is such that when any person has appeared before the Court with a case that a person is a tenant and other side shows that the facts set out by such person are false and the person appeared before the Court is a licensee then if legislature has not cast the jurisdiction to the Small Causes Court under Section 41 of the Act then after the end of the trial the defendant has to face another proceeding before the Civil court and has to apply for decree for eviction against such a person who is found to be a licensee or a trespasser as the case may be, but to avoid the circumstances to become a shuttlecock between Court to Court, Legislature has cast the jurisdiction to the Small Causes Court under Section 41 of the Act.

15. Therefore, according to this Court, in view of the clear intention of the Legislature, Section 41 of the Act is attracted to the facts of the present case and by invoking jurisdiction under Section 41 of the Act, no illegality or infirmity much less jurisdictional error is committed by the learned trial Judge which requires interference of this Court in exercise of the powers under Article 227 of the Constitution of India.

16. So far as the reliance placed on the decision of the Division Bench of the Bombay High Court in Ramesh Dwarkadas Mehra's case (supra) is concerned, according to this Court, the said decision is not applicable to the facts of the present case. In the said case the Bombay High Court has discussed Section 41 of the Act (15 of 1882) and has held that a suit by licensor against gratuitous licensee can be filed before Civil Court, City Civil Court or the High Court but not before the Presidency Small Causes Court. Further the Bombay High Court's decision will not be applicable to

the present case because Section 41 of the State of Maharashtra is different and distinct from Section 41 applied to the State of Gujarat. The difference between the two can be seen from the bare reading of Section 41 of the Act as applicable to State of Maharashtra and Section 41 as applicable to State of Gujarat. In the present case, the petitioner was never a gratuitous tenant. On the contrary, he was serving as a gardener cum watchman of the respondent society.

17. It is required to be noted that when the landlord/owner of an immovable property files an application under Section 41 of the Act, the occupier has to file a civil suit under Section 47 of the Act within the stipulated time and has to apply for stay of such proceedings and has also to ask for a declaration that the action of bringing an application under Section 41 was an act of trespass on the part of the landlord/owner. The petitioner has not resorted to the remedy contemplated under Section 47 of the Act. It may be pointed out that Section 47 of the Act has been deleted from the Maharashtra State and hence so far as State of Maharashtra is concerned, the occupier cannot have a remedy under Section 47 of the Act. (emphasis supplied)

18. In the case of Saiyed Jabbarhusain (supra), learned Single Judge of this Court has aptly discussed the scope, ambit and nature of powers under section 41 of the Act. In the said case it is also ruled that the person inducted as a licensee by Wakf committee as a Bangi on being discharged from service, licence to occupy the premises was determined and on application filed by Wakf Committee under section 41 for obtaining possession is maintainable. In the said judgment it is also observed that the Judge of the Small Causes Court has misdirected himself in

widening the scope of the proceedings and concluding that "long and exclusive possession clearly gives rise to a presumption that he must have been enjoying the possession of the disputed premises as a tenant".

(i) It would be appropriate to quote para 12 of the reported decision, which is as under:

"*Being fully conscious of the fact that the Court was a Court of very limited jurisdiction, supposed to make inquiry under Section 41 of the said Act only, he unfortunately permitted himself to be carried away by a fact which was not even the defence of deceased Hasan Abubakar. Having totally forgotten the scope, nature and ambit of Section 41 of the said Act, he proceeded to record a finding that the deceased Hasan Abubakar who was inducted as a licensee by the Wakf Committee; was in exclusive possession of the room in question and that would create a tenancy in his favour; and that such a right cannot be said to be a right of licensee. The learned Small Causes Court Judge was not deciding a dispute between the landlord and the tenant in which case the matter would have been covered by the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. He was very much conscious of the fact that he was deciding an application under Sec.41 of the said Act where the licensee or person who was inducted as licensee by the Wakf Committee was required to institute an application under Secs. 46 and 47 for the purpose of declaration that the action of bringing an application under Section 41 was an act of trespass on the part of the Wakf Committee and he was required to apply for stay of such proceeding in the City Civil Court within the stipulated time. For*

the reasons best known to Shri A.S. Sanghvi, the then Small Causes Court Judge, blatantly misdirected himself in law and dragged himself into the controversy which was not even raised by the deceased Abubakar. On such reasoning, he rejected the application of the Wakf Committee under Sec.41 by the impugned order, least realising thereby that the remedy which was available to the licensee or person who is inducted in the premises under Sec.41 of the said Act by resorting to Secs. 46 and 47 of the said Act was not availed of and he being a Court of very limited jurisdiction cannot open up Pandora's box and cannot create a case which was not even pleaded by the deceased Hasan Abubakar."

19. In view of the clear elucidation of this Court in the above referred to judgment, there is no manner of doubt that the proceedings taken out by the respondent under Section 41 of the Act is maintainable.

20. It is settled principle of law that the powers vested in the Court under Article 227 of the Constitution is a supervisory jurisdiction. The High Court must confine itself to the correcting of error of jurisdiction committed by the courts below and it cannot assume suo motu jurisdiction of appellate court and correct every mistake assumed to have been committed by the Courts below. It is a review of the decision making process and not the decision itself. The High Court cannot reappreciate preliminary or perceptive facts found by the fact finding authority under the statute. The aforesaid proposition of law is laid

down by the Supreme Court in the case of (i) **Mohd. Yunus v. Mohd. Mustaqim and others**, AIR 1984 SC 38, (ii) **Khanna Improvement Trust v. Land Acquisition Tribunal and others** (1995) 2 SCC 557, (iii) **H.B. Gandhi v. M/s. Gopinath** (1992) Supp. 2 SCC 312 and (iv) **State of Maharashtra v. Milind and others** (2000) 1 SCC 4.

21. In the case of **Ouseph Mathai and others v. M. Abdul Khadir,** (2002) 1 SCC 319, the Supreme Court has held that the petition filed under Article 227 of the Constitution of India cannot be treated like an extension of a statutory appeal or revision. There is no dispute that this is a petition filed under Article 227 of the Constitution.

22. Mr. A.K. Padia, learned advocate for the petitioner, is unable to demonstrate what illegality or infirmity much less jurisdictional error has been committed by the learned trial Judge in recording the impugned order requiring interference of this Court in this petition filed under Article 227 of the Constitution. This Court finds itself in complete agreement with the finding, reasoning and ultimate conclusion drawn by the learned Judge of the Small Causes Court as according to this Court no other conclusion was possible except the oner reached by the learned trial Judge which is required to be affirmed by this Court.

23. Seen in the above context, the petition lacks merit and deserves to be

rejected.

24. For the foregoing reasons, the petition fails and accordingly it is rejected with no order as to costs. Rule is discharged. Ad-interim relief granted at the time of issuance of Rule is vacated.

25. At this stage, Mr. A.K. Padia, learned advocate for the petitioner, urges that the interim relief granted by this Court at the time of issuance of rule which has remained operative till today may be continued for a further period of eight weeks to enable the petitioner to approach the higher forum.

26. The prayer made by Mr. Padia, learned advocate for the petitioner has been strenuously opposed by Mr. Sheth, learned advocate for the respondent. According to him, the petitioner is a permissive user and he has retained possession since pretty long time and this Court has rule that PSRP application filed by the respondent under section 41 of the Act is maintainable and therefore interim relief cannot be extended for any further period of time.

27. Having considered the request made by Mr. Padia and objection raised by Mr. Sheth and on the facts and circumstances emerging from the record of the case, it is true that the petitioner's use was permissive and he continued in possession for a pretty long time. Besides this Court has also held that PSRP

application filed by respondent is maintainable. Therefore, the prayer made by Mr. Padia, learned advocate for the petitioner cannot be accepted and hence the same is rejected.

(A.M. Kapadia, J.)

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